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Essential Immigration Policy Reform: Reinventing the National Interest Waiver

Kevin Burns

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ESSENTIAL IMMIGRATION POLICY REFORM: REINVENTING THE NATIONAL INTEREST WAIVER

*Kevin Burns **

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* Kevin Burns is a third-year law student at the University of Akron School of Law and an Associate Editor of the *Akron Law Review*.

I. INTRODUCTION

America has two pressing problems: a decrease in overall investment in innovative research and development,¹ and an erroneous perception of immigrants as harming America's economy that has stalled paths of legal immigration.² Pragmatic immigration policy should address these issues. Further, with research and innovation being dubbed the "lifeblood of a high-tech economy" and found to play a key role in the "economic and personal well-being of most citizens," it is imperative to strengthen this sector by supporting the people who drive technological innovation and improve economic performance—namely highly-skilled immigrants.³ Creating a more welcoming immigration system could help achieve these goals. The National Interest Waiver (NIW), a specific classification for employment-based immigration visas, already serves this purpose of bringing the best and brightest into the country to improve the U.S. economically and culturally by contributing to technological advancements.⁴ However, it remains underutilized.⁵

In 1990, Congress amended the Immigration and Nationality Act to permit more employment-based visas into the country through a widely supported bill, the Immigration Act of 1990 (IMMACT 90).⁶ With this

1. See NORMAN R. AUGUSTINE, *IS AMERICA FALLING OFF THE FLAT EARTH?* 18 (National Academies Press, 2007). See also AMERICAN ACADEMY OF ARTS & SCIENCES, COMM. ON NEW MODELS FOR U.S. SCI. & TECH. POL'Y, *RESTORING THE FOUNDATION: THE VITAL ROLE OF RESEARCH IN PRESERVING THE AMERICAN DREAM* 4 (Cambridge, Ma., 2015) (reporting that America fell to 10th place among fellow Organization for Economic Co-operation and Development (OECD) countries in research and investment development).

2. See Daniel Griswold, *Reforming the US Immigration System to Promote Growth*, MERCATUS CTR. 8 (2017), <https://www.mercatus.org/system/files/griswold-immigration-reform-mercatus-research-v1.pdf> [<https://perma.cc/G43Q-BYWR>] (showing that immigrants boost economic growth).

3. See AMERICAN ACADEMY OF ARTS & SCIENCES, *supra* note 1, at 14, 120 (discussing how the U.S. can invest in immigrants to help fuel our economy); see generally BENN STEIL ET AL., *TECHNOLOGICAL INNOVATION AND ECONOMIC PERFORMANCE* 71–72 (Princeton Univ. Press, 2002) (recommending relaxed visa entry requirements and proposing goals to increase the number of highly-skilled immigrants will boost an innovative rich economy).

4. Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)(B)(i) (2012).

5. The average number of FOIA approved NIW petitions from the years 2003–2018 was 4,320, while the total number from 2003 through January of 2019 was 71,189. Letter from Jill A. Eggleston, Director, FOIA Operations, United States Citizenship & Immigration Services, Form I-140, Immigration Petition for Alien Workers Approvals for National Interest Waiver from 2000 to February 04, 2019 (unpublished database, received through Freedom of Information Act Request) (on file with author). See *Figure 1*.

6. 8 U.S.C. §§ 1101–1537 (2012); see *Roll Call Vote 101st Congress-1st Sess.*, UNITED STATES SENATE, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=101&session=1&vote=00117 [<https://perma.cc/E2NC-ECZA>] (reviewing that this Bill passed the Senate on July

law, Congress set a new statutory framework for employment-based visas with a job offer requirement determined by the Department of Labor (DOL). The DOL would certify that the job offer meets all regulatory guidelines through offering a labor certificate.⁷ Congress carved out a unique exception to the job offer requirement rule (known as the NIW) and bypassed the labor certificate process.⁸ Under this exception, a petitioner could request that the labor certification requirement be waived if their proposed endeavors fit within the “national interest of the United States.”⁹ Despite the benefits of the NIW classification, it has been an underutilized tool to meet the Congressional goals of a more competitive, innovative economy.

In addressing the missed opportunity of the NIW classification, former Department of Homeland Security (DHS) Secretary, Jeh Johnson, penned a 2014 memorandum instructing U.S. Citizenship and Immigration Services (USCIS) to implement administrative improvements to enhance the overall usefulness of the NIW.¹⁰ Secretary Johnson described the NIW as an economic device that promotes research and development.¹¹ In calling for administrative improvements, Secretary Johnson recognized that the NIW was an “underutilized” tool with “limited guidance with respect to its invocation.”¹² Secretary Johnson directed the USCIS to clarify the standard of granting the NIW to promote its “*greater use* for the benefit of the U.S. economy.”¹³ This has yet to be done. America’s immigration policy should focus on national goals such as to have the most innovative and dynamic economy, and the NIW classification could be put into *greater use* to help meet this goal.¹⁴

The alternative views supported by President Donald Trump are that

13, 1989 with 81 yeas and 17 nays and 2 not voting); *see also Final Vote Result For Roll Call 406*, OFFICE OF THE CLERK U.S. HOUSE OF REP., <http://clerk.house.gov/evs/1990/roll406.xml> [<https://perma.cc/3DPX-3T2P>] (reporting that the Bill passed the House with 231 in support and 192 against the bill).

7. 8 U.S.C. §§ 1182(a)(5)(A)(i)(I)–(II) (2012).

8. Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)(B)(i) (2012).

9. *Id.*

10. *See* Memorandum from Jeh Charles Johnson, Secretary, Dept. of Homeland Security on Policies Supporting U.S. High-Skilled Businesses and Workers to Leon Rodriguez, Director, USCIS (Nov. 20, 2014), <https://www.aila.org/infonet/dhs-memo-on-policies-supporting-us-high-skilled> [<https://perma.cc/EJK8-AZBN>].

11. *Id.* at 1.

12. *Id.* at 4.

13. *Id.* at 3–4 (emphasis added).

14. Ezra Klein, *A Nativist Argument for Immigration*, NEWSWEEK (Sept. 27, 2010), <https://www.newsweek.com/nativist-argument-immigration-72013> [<https://perma.cc/9FX5-HWQG>].

immigrants take native jobs and cause native wages to decrease.¹⁵ Therefore, the focus of immigration policy should be on tighter border security and combating illegal immigration instead of making better use of employment-visa categories.¹⁶ This view overlooks the complexity of immigration policy and is not well supported in the literature.¹⁷ By choosing policies that close the door to highly skilled immigrants, the U.S. misses opportunities for economic growth.¹⁸ Immigration reform should focus on making better use of niches within the employment-based visa ecosystem, such as the NIW, to improve technological innovation and advance the economy.¹⁹

In exploring the creation and statutory framework of the NIW, policymakers will recognize that the NIW could be issued strategically to meet national objectives. The fact that immigrants add to the economy should move policymakers toward a shared goal of reforming the NIW classification. To put the NIW in greater use and make the NIW filing process more efficient, USCIS should adopt a more transparent approach to what a successful application looks like and invest in creating a user-friendly website with features that communicate expectations for petitioners. This will promote trust and transparency between the government and prospective petitioners. Additionally, USCIS should administer the NIW benefit by using a standardized system within current Department of Labor tools that will create a user-friendly process to fulfill Congress' intent. Restructuring the administrability of the NIW will help

15. See George J. Borjas, *Yes, Immigration Hurts American Workers*, POLITICO (Sept. 2016), <https://www.politico.com/magazine/story/2016/09/trump-clinton-immigration-economy-unemployment-jobs-214216> [<https://perma.cc/7UTU-KNZL>] (discussing that President Donald Trump misstated research on immigration); see also George J. Borjas, *The Labor Demand Curve Is Downward Sloping: Reexamining The Impact of Immigration on the Labor Market*, 118 Q. J. ECON. 1335, 1335 (2003) (analyzing adverse effects on the job market due to immigration).

16. Peter Schuck, *The Great Immigration Debate*, AM. PROSPECT (Dec. 5, 2000), <https://prospect.org/justice/great-immigration-debate/> [<https://perma.cc/6GU5-6XUC>]; see also Molly Ball, *Donald Trump's Campaign Is Based on Fear*, ATLANTIC (Sept. 2, 2016), <https://www.theatlantic.com/politics/archive/2016/09/donald-trump-and-the-politics-of-fear/498116/> [<https://perma.cc/8R8F-UWGV>] (discussing how fear impacts policy choices).

17. Susan Ferriss, *How Trump and Sessions Cherry-Picked Data to Blame Immigrants for Lower Wages*, CTR. FOR PUB. INTEGRITY (April 30, 2018), <https://publicintegrity.org/immigration/how-trump-and-sessions-cherry-picked-data-to-blame-immigrants-for-lower-wages/> [<https://perma.cc/6GMF-TKY9>].

18. See Jacqueline Varas, *Restricting Legal Immigration to America Won't Help Our Economy*, HILL (Mar. 7, 2018), <https://thehill.com/opinion/immigration/377216-restricting-legal-immigration-to-america-wont-help-our-economy>, [<https://perma.cc/VAC9-W9PQ>] (reporting that immigrants in the U.S. are critical to the workforce and that all levels of skilled immigrants strengthen the economy).

19. See Griswold, *supra* note 2, at 11 (noting that “immigrants are more innovative than natives.”).

meet Secretary Johnson's objective of putting the NIW to greater use while ensuring economic growth.

II. MOLDING THE EB-2 NIW EXCEPTION

A. *The statutory framework for the NIW.*

In 1990, Congress reformed immigration law through a major bipartisan immigration compromise, the Immigration Act of 1990 (IMMACT 90 or the Act).²⁰ In this compromise, Congress created a two-track immigration system: one for employment-based visas, and one for family-based visas.²¹ Under the employment-based visa path, foreign-born individuals can gain lawful permanent status after meeting statutory requirements such as proof of a job offer.²² Congress carved out an exception to the job offer rule by passing the labor-certificate process through the DOL by waiving the job offer requirement if the petitioner's work is within the national interest.²³ All areas of employment-based visas require the beneficiary to file the labor certificate through the DOL.²⁴ To make the NIW more flexible, Congress amended the NIW program to add more prospective candidates in the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA).²⁵ In amending the NIW provision of the Act, Congress inserted the word "professions" after the word "arts,"²⁶ thereby expanding the NIW to aliens

20. Amended title 8 U.S.C: Aliens and Nationality enacted by the 101st United States Congress on Nov. 29, 1990.

21. Immigration and Nationality Act, Pub. L. No. 101-649, 8 U.S.C. (amended 1990).

22. 8 U.S.C. § 1153(b) (2018).

23. See 8 U.S.C § 203(b)(2)(B) (2018); 8 U.S.C. § 1153(b)(2)(B)(i) (2012) (stating that under the "Waiver of job offer" provision of the Act, the Attorney General has discretion to waive the labor certification requirements when it is in the national interest and "that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.").

24. 8 U.S.C. § 1182(a)(5)(A)(i)(I)–(II) (2012); see also *Rizvi v. Dept. of Homeland Secretary ex rel. Johnson*, 627 Fed. Appx. 292, 294 (5th Cir. 2015) (unpublished) (reviewing labor certificate procedures); see also Alexis M. Hermann & Katharine G. Abraham, Report 929, *Revising the Standard Occupational Classification Sys.*, U.S. DEP'T. OF LABOR (1999), <https://www.bls.gov/soc/socrpt929.pdf> [<https://perma.cc/5MMY-PMFA>] (referencing the DOJ tool, O*NET, the Occupational Information Network).

25. Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, H.R. 3049, 102nd Cong. (1991) (enacted).

26. 8 U.S.C. § 1153(b)(2)(B)(i) (2018); see also *Emp't-Based Immigrants*, 56 Fed. Reg. 60897, 60900 (Dep't. of Justice, Immigration and Naturalization Serv. Nov. 29, 1991) (stating that "an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the 'prospective national benefit' [required of alien seeking to qualify as 'exceptional.']. The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.").

who are professionals with advanced degrees.²⁷

The employment-based visa category is divided into three subdivisions.²⁸ The first consists of aliens “with *extraordinary*” abilities,²⁹ and the third is for skilled workers, professionals, and “other workers.”³⁰ The EB-2 NIW program comes from the second group for aliens with *exceptional* abilities in the sciences, arts, or businesses and affords more attention by USCIS and policymakers. Under the exceptional ability framework, the Act “requires that the alien will prospectively substantially benefit the national economy, cultural or educational interests, or welfare of the United States because of his or her exceptional ability in the sciences, arts, or business.”³¹

B. Congressional intent for an adaptable NIW standard.

When President George W. Bush signed IMMACT 90 into law, he reflected the Congressional findings that the Bill addressed the need to attract the best and brightest by emphasizing: “This Bill provides for vital increases for entry on the basis of skills, infusing the ranks of our scientists and engineers and educators with new blood and new ideas.”³² This speech captured the economic focus of the Act while pointing out the goal of attracting and retaining innovative and entrepreneurial skilled immigrants.³³

During the Congressional debates, Senator Ted Kennedy of Massachusetts called on his colleagues to end the polarization around American immigration policy that is based on unfounded fears that immigrants take jobs from locals and commit crimes.³⁴ Senator Kennedy

27. 8 U.S.C. § 208(b)(3)(d) (2018).

28. 8 U.S.C. § 1153(b) (2018).

29. 8 U.S.C. § 1153(b)(1)(A)(i) (2018) (emphasis added); 8 C.F.R. § 204.5(h)(2) (2019) (defining this classification as a “level of expertise indicating that the individual is one for the small percentage of individuals at the very top of their fields”); *see also* 8 C.F.R. §§ 204.5(h)(3)(i)–(x) (2019) (explaining evidence that petitioner must demonstrate).

30. 8 U.S.C. § 1153(b)(3) (2018).

31. *See* Memorandum from USCIS on Evaluation of Evidentiary Criteria in Certain Form I-140 Petitions (AFM Update AD 10-41) (Aug. 18, 2010) 1, 2, <https://www.uscis.gov/sites/default/files/USCIS/Outreach/Interim%20Guidance%20for%20Comment/Kazarian%20Guidance%20AD10-41.pdf> [<https://perma.cc/7GYA-EC78>] (stating that the exceptional ability framework in the Act “requires that the alien will substantially benefit the national economy, cultural or educational interests, or welfare of the United States because of his or her exceptional ability in the sciences, arts, or business.”).

32. George W. Bush, remarks on signing the Immigration Act of 1990, 1990 DAILY COMP. PRES. DOC. 10 (Nov. 29, 1990).

33. *Id.*

34. 101 CONG. REC. S14739, S14748, *reprinted in* U.S. GOV. PUBL’G OFF., (Jun. 20, 1990) (comments of Sen. Kennedy).

highlighted that research supports the premise that immigrants offer long-term economic benefits and “immigration remains a central ingredient to retaining America’s economic strength.”³⁵ In discussing the Act, Representative Hamilton Fish IV of New York, a member of the Select Commission on Immigration and Refugee Policy, stated: “This country thrives on the new blood and vitality brought by immigrants.”³⁶ Representative Fish encouraged a strong employment-based visa category by reporting that the Conference Committee agreed to address “America’s business needs to compete in a global economy.”³⁷

The Honorable Glenn Anderson of California stated that immigration policies that increase visas for highly skilled individuals are “desperately needed” for the U.S. to compete in a competitive “world marketplace.”³⁸ Representative Anderson summarized findings from the Census Bureau and the DOL which stated that skilled immigrants benefit the economy by paying more in taxes than they use in social welfare benefits, “contributing between \$12,000 and \$20,000 more in taxes than they use in social services” and contributing to reducing the Government deficit.³⁹ In making his point, Anderson cited a DOL study named, “The Effects of Immigration on the U.S. Economy and Labor Market,” which found that immigrants provide a net benefit to the overall economy.⁴⁰ Anderson cautioned that “when we are under economic attack by nations like Japan, we must use all possible advantages of the brainpower and expertise that immigrants offer us.”⁴¹ Representative Bruce Morrison of Connecticut reported how IMMACT 90 would address workforce changes of a modern and global economy, and that foreign-born, skilled workers benefit the local economy by adding more jobs.⁴² The architects of the Act worked to make American businesses more competitive in the modern global market.⁴³ In support of this premise, 38 leading economists testified that immigration has a favorable influence on the U.S. economy.⁴⁴

Representative Jack Brooks of Texas discussed that the proposal

35. *Id.*

36. 101 CONG. REC. H36007, H36837-8, *reprinted in* U.S. GOV. PUBL’G OFF., (Oct. 27, 1990) (statement of Rep. Hamilton Fish).

37. *Id.* at 36838.

38. 101 CONG. REC. H27396, H27403, *reprinted in* U.S. GOV. PUBL’G OFF., (October 3, 1990) (testimony of Hon. Glenn M. Anderson).

39. *Id.*

40. *Id.*

41. *Id.*

42. 101 CONG. REC. H27038, H27080, *reprinted in* U.S. GOV. PUBL’G OFF., (Oct. 2, 1990) (statement of Rep. Morrison of Connecticut).

43. *Id.* at 27073.

44. *Id.*

concerning employee-based visas was designed to “increase visas for those immigrants who can contribute to improving American competitiveness in the world market by attracting highly skilled individuals to our country.”⁴⁵ Additionally, Senator Christopher Dodd of Connecticut debated that a major character of the employee-based classification in the Act is a movement to address the economic well-being of the nation.⁴⁶ In its implementation, Congress applied most of the recommendations from the Commission on Immigration and Refugee Policy Committee Report, which was a bipartisan effort to investigate and recommend immigration policy.⁴⁷

C. Crucial cases that help define NIW standards.

Congress never defined what it meant by the term “national interest” in the Act, and administrative agencies also declined to define national interest by regulation.⁴⁸ Hints for what Congress intended the national interest to mean can be found in the reports from the Committee on the Judiciary, which noted the meaning included immigrants who benefit the national economy.⁴⁹ Deferring to the Immigration and Naturalization Service’s (INS, currently USCIS) interpretation of national interest under *Chevron* has led to criticism.⁵⁰ The USCIS used Administrative Appeals Office (AAO) decisions⁵¹ and interim decisions⁵² to direct and bind USCIS officers to shape the interpretation of the national interest when

45. *Id.* at 36837.

46. 101 CONG. REC. H35613, reprinted in U.S. GOV. PUBL’G OFF., (Oct. 26, 1990) (comments of Sen. Christopher J. Dodd of Connecticut).

47. Carlos Ortiz Miranda, *United States Commission on Immigration Reform: The Interim and Final Reports*, 38 SANTA CLARA L. REV. 645, 646 (1998).

48. *Id.*

49. STEPHEN YALE-LOEHER ET AL., IMMIGRATION LAW AND PROCEDURE § 39.04 (2018).

50. *Compare Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), with *Arctic Ice Cream Novelties, Ltd. P’ship v. Reno*, No. 96-35530, 1998 U.S. App. LEXIS 470, at *7 (9th Cir. 1998) (ruling that the term National Interest has been read as a “general term of no precise meaning and Congress has expressed no specific intent with respect to its meaning,” and the court should defer to the INS’s interpretation so long as it is not arbitrary or capricious.). *But see* *Mikhailik v. Ashcroft*, No. C 04-0904 FMS, 2004 WL 2217511, at *6 (N.D. Cal. Oct. 1, 2004) (finding a “judicial review of the Attorney General’s decision denying a national interest waiver under 8 U.S.C. § 1153(b)(2)(B) is neither precluded by statute nor committed to agency discretion by law and the Court has subject matter jurisdiction pursuant to the APA and 28 USC § 1331).

51. Relevant decisions include: X, EAC 92 091 50126 (July 21, 1992) [hereinafter, *Mississippi Phosphate*]; New York State Dep’t of Transp., 22 I&N Dec. 215, 217–18 (Act. Assoc. Comm’r 1998) (NYSDOT); *Dhanasar*, 26 I&N Dec. 884 (AAO 2016).

52. USCIS Memorandum, *National Interest Waiver Adjudicator Guidance*, January 27, 2017, U.S. Citizenship and Immigration Services 1, 12 (2017).

deciding NIW petitions.⁵³ Arguably, these cases and directives conferred benefits and changed the law without sufficient procedures required under the Administrative Procedure Act (APA), and thus violated the APA because these administrative directives acted as a legislative or substantive rule without the required “notice-and-comment” procedures.⁵⁴

The first in the line of NIW cases was a seminal case referred to as the “*Mississippi Phosphate*” case. The Administrative Appeals Unit identified several factors in defining the national interest.⁵⁵ Factors included: (1) enhancing the United States economy; (2) raising wages and to improve working conditions for U.S. workers; (3) advancing education and training programs for U.S. children and other qualified workers; (4) improving health care; (5) increasing affordable housing for underserved citizens; (6) improving the U.S. environment and the use of natural resources; or (7) relating to a request from an interested government agency.⁵⁶

The second case which overruled the *Mississippi Phosphate* case was *Matter of New York State Department of Transportation (NYSDOT)*.⁵⁷ The court held that applicants must meet a three-prong test to waive the labor certificate. First, the petitioner must seek an area of employment that is of “substantial intrinsic merit.”⁵⁸ Second, the petitioner must show that any proposed benefit from the individual’s endeavors would be “national in scope.”⁵⁹ Third, the petitioner must demonstrate that “the national interest would be adversely affected if a labor certification were required for the foreign national.”⁶⁰ The petitioner must demonstrate “a national benefit so great as to outweigh the national interest inherent in the labor certification process.”⁶¹ *NYSDOT*’s third prong requires a petitioner to demonstrate that they will assist the national interest to a “substantially greater degree than would an available U.S. worker having the same

53. YALE-LOEHER, *supra* note 49, at § 39.04.

54. 5 U.S.C. § 553 (2012); *see* 5 U.S.C. § 551(4) (2012); *cf.* *Texas v. United States*, 328 F.Supp.3d 662 (S.D.Tex., 2018).

(stating the DACA program violated the APA procedural guidelines because the APA was a legislative rule which did not follow rule-making procedural requirements and the exemptions in 5 U.S.C.A. § 553(A)(B)).

55. *See* *Mississippi Phosphate*, *supra* note 51, at *7–8.

56. *Id.*

57. *See* *New York State Dep’t of Transp.*, 22 I&N Dec. 215, 217–18 (Act. Assoc. Comm’r 1998) (referred to as *NYSDOT*).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

minimum qualifications.”⁶² To reach this burden, the petitioner must establish a history of evident accomplishments with “some degree of influence on the field as a whole.”⁶³

Matter of Dhanasar overturned *NYSDOT* in 2016, responding to the confusion of carrying out the third prong of the *NYSDOT* holding.⁶⁴ The third prong of *NYSDOT* was found to be especially problematic for entrepreneurs and self-employed individuals.⁶⁵ The court in *Matter of Dhanasar* held that USCIS may grant the NIW if the petitioner demonstrates three prongs: first, that the foreign national’s proposed endeavor has both substantial merit and national importance; second, that they are well positioned to advance the proposed endeavor; lastly, that, on balance, it would be beneficial to the United States to waive the job offer and labor certification requirements.⁶⁶ This case overruled the *NYSDOT* focus on the geographical scope of the proposed endeavor and placed weight on a comparison to U.S. workers. The *Dhanasar* case made the process more flexible and less burdensome for applicants in attempting to prove the third prong in the *NYSDOT* case, stating: “We note that this new prong, unlike the third prong of *NYSDOT*, does not require a showing of harm to the national interest or a comparison against U.S. workers in the petitioner’s field.”⁶⁷ Examples of evidence include a meaningful explanation of the professional membership, awards, accolades, certifications, and any publications.⁶⁸ Evaluators confirm publications and citations with Google Scholar.⁶⁹

Standards of the NIW adjudication are outlined in a training manual issued by the USCIS entitled, “National Interest Waiver Adjudication Guidance.”⁷⁰ The field manual’s objectives are to provide an overview of the new framework for adjudicating the NIW and to train all USCIS employees who administer the NIW EB-2 classification program.⁷¹ The manual states that the *Dhanasar* decision has clarified that NIW petitions may be granted to “foreign inventors, researchers, and founders of start-

62. K-C-D-Q-, ID# 16004 at 5 (AAO Mar. 11, 2016).

63. *Id.*

64. *Dhanasar*, 26 I&N Dec. 884, 891 (AAO 2016).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Repaka v. Beers*, 993 F. Supp. 2d 1214, 1219 (S.D. Cal. 2014).

69. *Id.* at 1218 (concluding that although the petitioner’s Google Scholar page indicated cited published work, the petitioner failed to show that he played an important role in his field through his published work).

70. USCIS, *supra* note 52, at 1, 12.

71. *Id.* at 13 (mandating that USCIS officers follow the three-pronged test set out in *Matter of Dhanasar* and overruling the *NYSDOT* standard).

up enterprises intended to benefit the U.S. economy.”⁷² The manual states that *Dhanasar* vacated *NYSDOT* and highlighted *Dhanasar*’s intent to “deemphasize *NYSDOT*’s focus on the geographical scope of the proposed endeavor and does not require comparison to the U.S. worker.”⁷³ The field manual outlines the three factors of *Dhanasar* and evidence to consider for entrepreneur petitioners.⁷⁴

D. Legislation that affects the NIW.

House Bill 1915, the Immigration in the National Interest Act of 1995, has been dormant for nearly 23 years.⁷⁵ Congressman Lamar Smith of Texas re-introduced the Bill in 2017 as House Bill 3775 and proposed modifications for the NIW.⁷⁶ In 1995, Representative Lamar Smith of Texas discussed that the Act “modified provisions of the bill on employment related immigration” to remove barriers to “international trade and protecting the access of American businesses to individuals with special qualifications who can help our economy.”⁷⁷ Representative Smith reported that the Bill “recognized the critical importance of outstanding professors and researchers and multinational executives and managers by placing these two immigrant categories in a new high priority—second preference—exempt from time consuming labor certification requirements.”⁷⁸ Another goal of this Bill is to restore the “national interest waiver of labor certification requirements and delineated specific criteria for its exercise.”⁷⁹ This sought to “delete[] a provision potentially reducing available visas up to 50 percent.”⁸⁰ The findings of these amendments stated that the goal is to maximize American competitiveness in international markets and to encourage job growth.⁸¹ Further, Congressman Robert (Bob) Stump of Arizona commented on the Bill by adding that it “takes an important step toward returning our immigration policies to their original intent: to serve our national interest

72. *Id.* at 15.

73. *Id.* at 16.

74. *Id.* (directing field adjudicators to adopt the *Dhanasar* three-prong framework and specifically furnishing what kind of evidence to consider).

75. H.R. 1915, 104th Cong. (sponsored by Rep. Lamar Smith of Texas).

76. H.R. 3775, 115th Cong. (sponsored by Rep. Lamar Smith of Texas).

77. 104 CONG. REC. H2378, H2379, reprinted in U.S. GOV. PUB. OFF. (2nd Sess. Mar. 19, 1996) (testimony of Rep. Lamar Smith).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

and make America a better place for citizens and immigrants alike.”⁸²

Congress attempted to delineate the NIW by identifying the classification as appropriate for immigrants whose endeavors would substantially benefit the national security and national defense, as well as benefit “health care, housing, or educational opportunities” in underserved geographical areas.⁸³ Immigrants who demonstrate their work will benefit industry or location specific economic or employment opportunities.⁸⁴ It further delineated the NIW as appropriate for those who will add to “the development of new technologies or improve the environmental protection purposes and “productive use of national resources.”⁸⁵ The Act was reintroduced twenty-three years later as the National Interest Act of 2017 and has sat idle with the Subcommittee on Immigration and Border Security.⁸⁶

III. THE NEED FOR NIW REFORM

A. *Illogical standards could generate absurd results.*

If modern immigration standards under the NIW had been applied to past cases, America may have missed out on great innovators. Hypothetically, adjudicators of the NIW may have denied Manhattan Project scientists⁸⁷ such as Maria Goeppert Mayer,⁸⁸ Enrico Fermi,⁸⁹ Chien-Shiung Wu (also known as the First Lady of Physics),⁹⁰ and Eugene Wigner⁹¹ from the NIW classification visa simply because their letters of

82. *Id.* at H2398.

83. *Immigration in the National Interest Act of 1995: Report of the Comm. on the Judiciary House of Representatives on H.R. 2202*, H.R. Rep. No. 104-469, pt. 1, at 69–70.

84. *Id.*

85. *Id.*

86. H.R. 3775, 115th Cong. (2017–2018) (referred to House Judiciary Subcommittee on Immigration and Border Security on Sept. 28, 2017).

87. See *The Manhattan Project*, ATOMIC HERITAGE FOUND., <https://www.atomicheritage.org/history/manhattan-project> [<https://perma.cc/AU6W-VKDE>] (reporting that the Manhattan Project, formed by the U.S. Government in 1941, led to the development of the first nuclear weapons).

88. See *Profile: Maria Goeppert-Mayer*, ATOMIC HERITAGE FOUND., <https://www.atomicheritage.org/profile/maria-goeppert-mayer> [<https://perma.cc/8S5C-KX84>] (referencing that Maria Goeppert Mayer was a German-born theoretical physics who researched the separation of uranium isotopes for the development of nuclear weapons).

89. See *Profile: Enrico Fermi*, ATOMIC HERITAGE FOUND., <https://www.atomicheritage.org/profile/enrico-fermi> [<https://perma.cc/WGT5-XCNE>] (noting that physicist Enrico Fermi discovered new radioactive elements and won the Nobel Prize).

90. See *Profile: Chien-Shiung Wu*, ATOMIC HERITAGE FOUNDATION, <https://www.atomicheritage.org/profile/chien-shiung-wu> [<https://perma.cc/7RCD-F7RV>] (reporting that Chien-Shiung Wu developed instruments for radiation detection).

91. See *Profile: Eugene Wigner*, ATOMIC HERITAGE FOUND.,

recommendation (attached to their petitions) were considered insufficient. To make things more confusing, the NIW adjudicators would have offered no reason or explanation as to why they were denied.⁹² They could also have been denied under the ruling because they failed to demonstrate that their “research [had] been frequently cited by others or otherwise served as an impetus for progress in the field, that it has affected . . . industry,” and that the evidence failed to demonstrate that their work established “a record of success or progress in [their] area of research.”⁹³ Also, imagine a denial because these scientists failed to demonstrate how their “published and presented research constitutes a record of success or indicates a level of interest in [their] work from relevant parties that would be sufficient to meet this prong.”⁹⁴

Theoretically, the Czech-born biochemist Gerty Cori and Canadian-born pathologist and epidemiologist Elizabeth Stern⁹⁵ may have been denied the NIW because they failed to show evidence of their membership in professional groups.⁹⁶ The contributions of these pioneering women in fields of biochemistry, cancer treatment, and cell metabolism may have been stalled in a cumbersome immigration process and, after a long wait period, they could have been denied the NIW for failing to “demonstrate[] a record of success or progress in [their] field” because they both left for

<https://www.atomicheritage.org/profile/eugene-wigner> [<https://perma.cc/W663-NFNV>] (discussing Eugene Wigner’s accomplishments with the Manhattan Project).

92. See X, EAC 02 091173 52505, 1–5 (AAO Jan. 04, 2005) (concluded that the “benefit of retaining the alien’s services outweighs the national interest that is inherent in the labor certification process.” The petitioner was a PhD holder from Moscow working to improve American oceanographic research at Brookhaven National Laboratory and National Aeronautics and Space Agency (NASA). He was published in peer-reviewed articles 47 times and developed new techniques and scientific tools to conduct oceanography).

93. U-A-K-U-, ID# 1263736, 1, 6 (AAO June 5, 2018) (denying a Technology, Innovation, and Manufacturing (TIM) Engineer who was conducting research in the shale oil industry and research on the effects of natural gas on the environment).

94. See I-N-, ID# 1483 750, 1–7, n.5 (AAO Aug. 14, 2018) (concluding that a medical research studying in the field of computer aided drug discovery and cancer drug discovery failed to demonstrate that he was well-positioned to advance the proposed endeavor due to failing to prove the weight of his 44 published citations).

95. See Ellen Elliott, Ph.D., *Elizabeth Stern’s Cancer Research Has Had A Lasting Impact On Women’s Health*, JACKSON LABORATORY, <https://www.jax.org/news-and-insights/jax-blog/2016/september/elizabeth-stern-influenced-womens-health-initiatives> [<https://perma.cc/HB8T-9K7Q>] (discussing how Elizabeth Stern less than one year after graduating from medical school and became a pioneer in cancer research); Mildred Cohn, *Gerty Theresa Cori*, JEWISH WOMEN’S ARCHIVE, ENCYCLOPEDIA, <https://jwa.org/encyclopedia/article/cori-gerty-theresa> [<https://perma.cc/N4VW-KUV6>] (discussing how Cori left Europe due to “rampant antisemitism” for Buffalo, NY in the 1920s and went on to become a leader in the field of biochemistry).

96. See H-C-C-, ID# 433104, 1, 1–5 (AAO July 26, 2017) (denying a South Korean national plastic surgeon who developed new surgical techniques by “develop[ing] a new technique of breast augmentation” that offers advantages such as speedy surgery and painless recovery).

the United States early in their careers.⁹⁷ Or they could have been denied for “failing to show a degree of interest in [their] work from relevant parties that rise to the level of rendering [them] well positioned to advance [their] proposed endeavor.”⁹⁸

In principle, Bronislaw Malinowski,⁹⁹ the Polish-born father of modern day social Anthropology, may have been found ineligible for the NIW because he failed to “establish[] that he is well positioned to advance his proposed endeavor.”¹⁰⁰ Malinowski may have never had the opportunity to contribute to our understanding of humanity because he failed to document the reputation of the journals he published in.¹⁰¹ Or that he failed to offer evidence demonstrating that his peer review experience rose to the level to render him well-positioned to advance his proposed research even though he was trailblazing a new field within anthropology.¹⁰² He would not have known that he needed to include this information in his application.¹⁰³ Needless to say, these hypothetical outcomes of great scientists would have been a huge disadvantage to the United States.

B. Immigrants contribute to technological advancements.

Keeping talent in the United States increases its position in a competitive global economy by creating jobs.¹⁰⁴ Policymakers should

97. *Id.*

98. *Id.*

99. George Peter Murdock, *Bronislaw Malinowski*, 51 YALE L.J. 1235, 1236 (1942) (noting the influences of Bronislaw Malinowski from social anthropology to comparative law and jurisprudence).

100. *See* S-A-K-, ID# 1264560, 1, 7 (AAO June 5, 2018) (denying a neurologist the NIW who was researching the care and treatment of patients suffering from neurological diseases and was published in medical textbooks and leading medical journals. USCIS focused on his number of citations and his role as a peer manuscript reviewer).

101. *Id.*

102. *Id.*

103. *See Employment-Based Immigration: Second Preference EB-2*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-second-preference-eb-2> [<https://perma.cc/2EDQ-T2EK>] (explaining the NIW petition process. The USCIS reviews the NIW process and states that petitioners need to show three of following criteria in their petition: (1) evidence of an “official academic record” showing their degree relating to their area of exceptional ability; (2) letters that document ten years or more of full-time work experience in the said profession; (3) a license or certificate to practice ones profession; (4) evidence of salary for the exceptional ability listed; (5) membership in a professional group; (6) “recognition for your achievements and significant contributions to your industry or field by your peers”; and (7) any other evidence. This confuses applicants in understanding how their application and self-petition will be evaluated and has a high likelihood of causing confusion when compared to the NIW Field Manual and when compared to how these petitions are actually valued and evaluated).

104. *See* Stuart Anderson, *International Students Are Founding America’s Great Startups*,

recognize that immigrants add an entrepreneurial and innovative element to economic growth when deciding visa benefits.¹⁰⁵ A 2016 study conducted by the National Academies of Sciences, Engineering, and Medicine found that immigrants are more innovative than natives and boost the economy.¹⁰⁶ In 2015, the U.S. Patent and Trademark Office found that skilled immigrants surpassed native-born patent applicants in the U.S., with 52% of all the patents filed in the U.S. coming from foreign innovators.¹⁰⁷ According to the Partnership for a New American Economy, “76 percent of patents from America’s top [ten] patent-generating universities in 2011 had a foreign-born inventor” playing a central role in the development of the sciences, technology, engineering, and math fields.¹⁰⁸ These innovative products benefit the United States’ largest companies and grow the economy.¹⁰⁹ Since 2000, about 39% of American winners of the Nobel Prize have been awarded to immigrants in all categories, with all six of the American winners of a Nobel Prize in 2016 within the economics and scientific categories going to immigrants.¹¹⁰ Immigrants are also frequently cited and published in

FORBES (Nov. 5, 2018), <https://www.forbes.com/sites/stuartanderson/2018/11/05/international-students-are-founding-americas-great-startups/#435a8ff55568> [https://perma.cc/K2QE-K9CV] (finding that “International students who become founders of U.S. billion-dollar startups have created an average of more than 1,400 jobs per company. The collective value of their companies is \$96 billion, about equal to the market capitalization of the companies listed on the stock markets of Peru or Portugal.” And the NIW waiver most often has its roots in a F-1 adjustment of status).

105. Catherine Rampell, *Immigration and Entrepreneurship*, N.Y. TIMES: ECONOMIX BLOG (Jul. 1, 2013), <https://economix.blogs.nytimes.com/2013/07/01/immigration-and-entrepreneurship/> [https://perma.cc/B4SB-JXAE] (reporting that in a Kauffman Foundation Study, business formation for immigrants is highest in engineering and technology fields where about 25% of businesses formed were founded by immigrants between 2006–2012 and that number jumps to 43.9% in Silicon Valley).

106. See Griswold, *supra* note 2, at 11 (stating “‘immigrants are more innovative than natives; more specifically, high-skilled immigrants raise patenting per capita, which is likely to boost productivity and per capita economic growth.’ While immigrants account for 13% of the US population, they are responsible for one-third of all patent filings in the United States.”).

107. U.S. Pat. Statistics Chart Calendar Years 1963 to 2015, U.S. PAT. AND TRADEMARK OFF., PAT. TECH. MONITORING TEAM (2016), https://www.uspto.gov/web/offices/ac/ido/oeip/taf/us_stat.htm [https://perma.cc/2QB4-3FCH].

108. NYC.gov, *Immigrants Behind 76% of Patents from Top American Universities*, BLOOMBERG (Jun. 26, 2012), <https://www.mikebloomberg.com/news/immigrants-behind-76-of-patents-from-top-american-universities/> [https://perma.cc/5FEY-X6X3] (reporting that “Foreign-born inventors played especially large roles in cutting-edge fields like semiconductor device manufacturing (87%), information technology (84%), pulse or digital communications (83%), pharmaceutical drugs or drug compounds (79%), and optics (77%).”).

109. See Ahmed Mushfiq Mobarak, *Immigration and Innovation*, N.Y. TIMES: ECONOMIX BLOG (Feb. 12 2013), <https://economix.blogs.nytimes.com/2013/02/12/immigration-and-innovation/> [https://perma.cc/VR62-2TUT] (discussing how important skilled foreign workers are in advancing the United States’ comparative advantage in the sciences and innovation.”).

110. Stuart Anderson, *Immigrants Keep Winning Nobel Prizes*, FORBES (Oct. 8, 2017), <https://www.forbes.com/sites/stuartanderson/2017/10/08/immigrants-keep-winning-nobel->

science and engineering journal articles.¹¹¹

Research demonstrates that immigrants are more entrepreneurial than natives and their endeavors significantly adds to the economy. For instance, about 51% of billion-dollar startup companies have at least one immigrant founder.¹¹² This entrepreneurial trend of immigrants adding to the economy is further evidenced in studies coming from Fortune 500 companies. For example, immigrants founded about 20% of Fortune 500 companies between 1985–2010.¹¹³ In addition, the “Fortune 500 companies that boast immigrant or children-of-immigrant founders have combined revenues of \$4.2 trillion.”¹¹⁴ And “\$1.7 trillion of that amount comes just from the companies founded by immigrants.”¹¹⁵ Immigrants also created 25% of new high-tech companies with one million dollars in sales or more in 2006.¹¹⁶ Immigrants founded about a quarter of the technology and engineering start-ups in the U.S. and founded about half of Silicon Valley start-ups.¹¹⁷

According to Dr. Pia Orrenius, an immigration labor economist, skilled immigration grows the economy and makes it more efficient and productive.¹¹⁸ Dr. Orrenius reported that: “Immigration fuels the economy. When immigrants enter the labor force, they increase the productive capacity of the economy and raise Gross Domestic Product (GDP). Their incomes rise, but so do those of natives. It’s a phenomenon dubbed the ‘immigration surplus’”¹¹⁹ Despite reforms in

prizes/#17c93c6b117b [https://perma.cc/8TN4-EK7A].

111. *Id.*

112. Stuart Anderson, *Immigrants and Billion Dollar Start-Ups*, NAT’L FOUND. FOR AM. POL’Y 1–3 (2016), <http://nfap.com/wp-content/uploads/2016/03/Immigrants-and-Billion-Dollar-Startups.NFAP-Policy-Brief.March-2016.pdf> [https://perma.cc/7MH9-84ST].

113. *The “New American” Fortune 500*, PARTNERSHIP FOR A NEW AM. ECON. 2–3 (2011), <https://www.newamericaneconomy.org/sites/all/themes/pnae/img/new-american-fortune-500-june-2011.pdf> [https://perma.cc/45PR-JFZC].

114. *Id.*

115. *Id.*

116. *See, e.g.*, Jennifer Hunt & Marjolaine Gauthier-Loiselle, *How Much Does Immigration Boost Innovation?*, at 1 (Nat’l Bureau of Econ. Research, Working Paper No. 14312, 2008) (reporting that about 26% of U.S.-based Nobel Prize winners from 1990–2000 were awarded to immigrants).

117. T. A. Frank, *Green Cards for Grads*, WASHINGTON MONTHLY (May 1, 2009), <https://washingtonmonthly.com/2009/05/01/green-cards-for-grads/> [https://perma.cc/GH65-9RWW] (arguing that a goal of sensible immigration policy should be to avoid an “exodus of the people we[’]ve educated” and discussing that “[o]ne way to regain our dominance in the tech sector would be to get more of the brightest people in the world to move here.”).

118. Pia M. Orrenius, IZA INST. OF LABOR ECON., <https://www.iza.org/person/3172/pia-m-orrenius> [https://perma.cc/Y826-WTEE] (noting that Dr. Pia Orrenius is vice president and senior economist at the Federal Reserve Bank of Dallas with a research focuses on U.S. immigration policy).

119. Pia Orrenius, *Benefits of Immigration Outweigh the Costs*, GEORGE W. BUSH INST. (Spring 2016), <https://www.bushcenter.org/catalyst/north-american-century/benefits-of-immigration->

immigration law and policy in 1990, the U.S. has faced negative economic consequences of falling numbers of visas for highly skilled immigrants.¹²⁰ For instance, the Technology Policy Institute (TIP)¹²¹ reported that between 2003–2007, “visa restrictions kicked out enough foreign graduates of U.S. universities to slice \$13.6 billion off of our GDP.”¹²² The TIP examined 2012 Congressional immigration reform proposals to “loosen green card and temporary worker constraints for high-skilled workers” and found that by making the process more flexible, the national deficit would decrease over \$100 billion over ten years, which amounts to “almost 10 percent of the \$1.2 trillion needed to avoid automatic spending cuts.”¹²³

C. *Views holding that the NIW is an unnecessary immigrant benefit.*

Immigrants are often viewed “as bearers of alien cultures” who eventually “take up space, use public facilities, [and] compete for jobs,” with a risk to change society to their own vision.¹²⁴ To the average citizen, “immigration is not just a wealth-enhancing transfer of resources; it is also an enormous social gamble.”¹²⁵ Critics suggest that policymakers should invest more on border security and fighting illegal immigrants by keeping criminals and drugs out, which was the focus of immigration policy in the 1980s.¹²⁶ However, economists argue that this immigration focus has “yielded limited dividends,” distracting the public from two important

outweigh-costs.html [https://perma.cc/Q4P3-B6Z5]; see also George J. Borjas, *Yes, Immigration Hurts American Workers*, POLITICO (Sept.–Oct. 2016), <https://www.politico.com/magazine/story/2016/09/trump-clinton-immigration-economy-unemployment-jobs-214216>

[https://perma.cc/MP7G-XFGD] (valuing immigrations by estimating that “the current ‘immigration surplus’—the net increase in the total wealth of the native population—to be about \$50 billion annually.”).

120. H.R. REP. NO. 101-955 (1990) (Conference Report); see also Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

121. See *Mission Statement*, TECH. POL’Y INST., <https://techpolicyinstitute.org/mission-statement/> [https://perma.cc/XK2U-UYM9] (identifying that “The Technology Policy Institute is a think tank that focuses on the economics of innovation, technological change, and related regulation in the United States and around the world.”).

122. Noah Smith & Adam Ozimek, *Give Us Your Geniuses: Why Seeking Smart Immigrants Is a No-Brainer*, ATLANTIC (Jun. 13, 2012), <https://www.theatlantic.com/business/archive/2012/06/give-us-your-geniuses-why-seeking-smart-immigrants-is-a-no-brainer/258451/> [https://perma.cc/YEM2-7GST].

123. Arlene Holen, *Immigration Reform is a Painless Way to Reduce the Deficit*, TECH. POL’Y INST. (Nov. 23, 2012), https://techpolicyinstitute.org/press_release/immigration-reform-is-a-painless-way-to-reduce-the-deficit/ [https://perma.cc/6RRY-P7UW].

124. Peter Schuck, *The Great Immigration Debate*, AM. PROSPECT (Fall 1990), <https://prospect.org/article/great-immigration-debate> [https://perma.cc/XZZ5-7RJV].

125. *Id.*

126. *Id.*

questions: “[w]hich kinds of aliens should we seek, and how can we get them to come.”¹²⁷

Immigration policy critic Howard W. Foster exclaimed:¹²⁸ “There might be a few jobs that cannot be filled by three hundred million Americans,” such as jobs that are culturally specific and in remote areas like a Persian chef or Farsi professor.¹²⁹ Foster continues that even in those unique roles, there must be an American trained in such skills.¹³⁰ Foster’s views contend that employment-based immigration only helps the immigrant and not the host-nation because the foreign-born worker accepts less pay than an American and jobs shift away from locals to the immigrant worker.¹³¹

President Trump has also discussed the adverse effects of immigration and has suggested policy reform to limit highly-skilled immigrant visas and stop the issuance of green cards, stressing that: “Before any new green cards are issued to foreign workers abroad, there will be a pause where employers will have to hire from the domestic pool of unemployed immigrant and native workers.”¹³² George J. Borjas, PhD,¹³³ a Harvard labor economist often quoted in Trump’s speeches, argues that employment-based immigration leads to lower wages of natives. Dr. Borjas published economics papers that support his premise that immigration leads to adverse wage effects on natives, and in a 2003 paper he stated that: “Immigration lowers the wage of competing workers: a [ten] percent increase in supply reduces wages by [three] to [four] percent.”¹³⁴ Dr. Borjas also reported that “immigration has indeed harmed the employment opportunities of competing native workers.”¹³⁵

President Trump has cited Dr. Borjas’ research as authority for his

127. *Id.*

128. Howard W. Foster, NAT’L INT., <https://nationalinterest.org/profile/howard-w-foster> [<https://perma.cc/9LQG-W7A2>] (noting that Howard W. Foster is a lawyer specializing in civil RICO cases involving the employment of illegal immigration).

129. Howard W. Foster, *Why More Immigration Is Bad for America*, NAT’L INT. (Sept. 5, 2014), <https://nationalinterest.org/blog/the-buzz/why-more-immigration-bad-america-11210> [<https://perma.cc/S9QS-RM4R>].

130. *Id.*

131. *Id.*

132. Linda Chavez, *Trump Doesn’t Understand the Economics of Immigration*, FOREIGN POL’Y (Sept. 11, 2017), <https://foreignpolicy.com/2017/09/11/trump-doesnt-understand-economics-immigration-daca-raise-act/> [<https://perma.cc/BWS7-MDGN>].

133. Dr. George J. Borjas, HARVARD KENNEDY SCH., <https://sites.hks.harvard.edu/fs/gborjas/> [<https://perma.cc/P9TF-MN9L>] (noting that Dr. George J. Borjas is a labor economist, specialized in immigration issues, who teaches at Harvard’s John F. Kennedy School of Government).

134. George J. Borjas, *The Labor Demand Curve is Downward Sloping: Reexamining the Impact of Immigration on the Labor Market*, 118 Q. J. ECON. 1335, 1335 (2003).

135. *Id.* at 1336.

hard stance on immigration. In 2016, then Republican Party nominee for President, Trump exclaimed at a political rally that “immigration . . . produced lower wages and higher unemployment for our citizens, especially for African-American and Latino workers.”¹³⁶ In response, Dr. Borjas criticized Trump for misrepresenting his findings, stating “that the influx of immigrants can potentially be a net good for the nation” and help to increase the overall wealth of the nation.¹³⁷ Dr. Borjas stated that Trump misrepresented his research by looking at incomplete sections of his papers and minimizing the positive effects of immigration. In one study, Dr. Borjas reported that immigration “makes us more productive, and has a beneficial impact on economic growth.”¹³⁸ Dr. Borjas’s research has been under fire from his peers; his research findings on the adverse effects of immigration on wages of natives have been criticized in immigration related Racketeer Influenced and Corrupt Organizations Act (RICO) cases for their incomplete and unreliable methodology.¹³⁹ Cherry-picking data to frame immigrants as having a negative effect on the economy undermines the complex nature of economic and immigration policies and where the two data points intersect and miseducates voters and policymakers.¹⁴⁰

President Trump blamed the coronavirus pandemic of 2020 on immigration policy.¹⁴¹ While addressing voters at a political rally in February 2020, President Trump linked immigration to COVID-19,

136. George J. Borjas, *Yes, Immigration Hurts American Workers*, POLITICO (Sept.–Oct. 2016), <https://www.politico.com/magazine/story/2016/09/trump-clinton-immigration-economy-unemployment-jobs-214216> [https://perma.cc/BKA9-P3VS].

137. *Id.*

138. George J. Borjas, *What Does the National Academies’ Immigration Report Really Say?*, NATIONAL REV. (Sept. 22, 2016), <https://www.nationalreview.com/2016/09/immigration-national-academies-sciences-report-fiscal-economic-impact-native-born/> [https://perma.cc/ZT2R-P7SY].

139. See *Broussard-Wadkins v. Maples*, 895 F. Supp. 2d 1159, 1159 (N.D. Ala. 2012), *aff’d sub nom*, 535 Fed. Appx. 825 (11th Cir. 2013) (unpublished) (ruling that “Dr. Borjas did not use the correct data to perform the regression analysis central to his methodology. Instead, he used a false assumption to circumvent the facts in the case, which did not fit neatly into his theory” and concluding that he cannot serve as an expert witness); see also *Hall v. Thomas*, 753 F. Supp. 2d 1113, 1145 (N.D. Ala. 2010) (ruling that Dr. Borjas’ research is incomplete and used unreliable methods and portions of his analysis are “deeply problematic.”).

140. Susan Ferriss, *How Trump and Sessions Cherry-Picked Data to Blame Immigrants for Lower Wages*, CTR. FOR PUB. INTEGRITY (2018), <https://publicintegrity.org/immigration/how-trump-and-sessions-cherry-picked-data-to-blame-immigrants-for-lower-wages/> [https://perma.cc/CW9L-QSRQ] (analyzing the merits of Dr. Borjas’ research findings that immigrants cause adverse wage differentials).

141. Jeffrey Martin, *Trump Blames Dem Immigration Policy For Coronavirus: ‘Border Security Is Also Heath Security’*, NEWSWEEK (Feb., 28, 2020), <https://www.newsweek.com/trump-blames-dem-immigration-policy-coronavirus-border-security-also-health-security-1489813> [https://perma.cc/533D-8BAY].

stating that “[w]hether it’s the virus that we’re talking about or many other health threats, the Democrat policy of open borders is a direct threat to the health and wellbeing of all Americans.”¹⁴² President Trump’s discourse miseducates voters on immigration policy. Infected Americans returning home from Asia and cruise ships were spreading the virus, as well as immigrants entering the country. Moreover, falsely stating that Democrats support an “open border” policy miseducates the voting public; “open borders” is not a talking point of democrats.¹⁴³ Also, Immigration law is not a binary issue of close borders or open borders; it is more complicated. A reasoned immigration plan could bring the country increased economic prosperity while immigration policies based on fear that is unsupported by research or data could be damaging to the country.

D. Other nations compete against the U.S. with immigration laws.

Granting employment-based visas without a job offer is controversial, but other countries have experimented with similar programs as the NIW classification because they are found to be a beneficial economic tool.¹⁴⁴ In 2002, the United Kingdom (U.K.) implemented the Human Capacity Building policy to attract the best and brightest to help build its economy and fill job shortages.¹⁴⁵ Policymakers focused on the “human capital approach,” with the goal of increasing the “skills and knowledge base of a country’s workforce to promote innovation, productivity growth, and ultimately economic growth and national competitiveness.”¹⁴⁶ Also in 2002, the U.K. created the “Highly Skilled Migrant Programme” (HSMP) to attract the “best and brightest” to compete for talent. This program used a “points-based system that included a range of criteria including qualifications, previous earnings, age, and prior U.K. experience.”¹⁴⁷ The program offers applicants an

142. *Id.*

143. Robert A. Stribley, *Few Americans Want Open Borders—Democrats Included*, MEDIUM (Feb. 22, 2019), <https://medium.com/s/story/few-americans-want-open-borders-democrats-included-dba12884c133> [https://perma.cc/T5BL-GMVQ] (reporting how no democratic policymakers support open borders).

144. Elizabeth Redden, *Ready to Go Expat?*, INSIDE HIGHER ED. (Jul. 26, 2017), <https://www.insidehighered.com/news/2017/07/26/several-countries-launch-campaigns-recruit-research-talent-us-and-elsewhere> [https://perma.cc/UT99-BBDT] (reporting that Canada, Britain, France, and Germany are initiating programs to attract the highly skilled immigrations to compete with the U.S.).

145. Lucie Cerna, *Selecting the Best and Brightest*, MIGRATION OBSERVATORY (Dec. 8, 2011), <https://migrationobservatory.ox.ac.uk/resources/videos/selecting-best-brightest/> [https://perma.cc/XGY6-623G].

146. *Id.*

147. *Id.*

opportunity before submitting their application to enter their qualifications into a points calculator to determine their eligibility.¹⁴⁸ This acts as a useful resource for applicants to make the best immigration choice.¹⁴⁹ Additionally, within the goals of attracting the best and brightest, the U.K. government created the Rutherford Fund to attract foreign researchers.¹⁵⁰ The program will provide fellowships for early-career and senior researchers with the national goal of the U.K. to be a world-leader in science and research.¹⁵¹ Although this program is a post-Brexit plan for the U.K. to secure research and development, it identifies the influence immigration has on innovation and the economy.¹⁵²

In Canada, Prime Minister Justin Trudeau highlighted that “Canada’s immigration policies have an edge over [the] U.S. . . . when it comes to attracting manpower [and] business,” and that Canada has been able to attract top talent through drawing on pools of “highly educated, futuristic, growth oriented diverse people from all corners of the world.”¹⁵³ Canada implemented Canada’s Federal High Skilled immigration programs and its Provincial Nominee Program to compete with the U.S. and attract top innovators.¹⁵⁴

Other nations see the value in attracting the best and brightest and view the U.S. as competition for innovative research.¹⁵⁵ By reforming immigration law to emphasize the important work immigrants are capable of while welcoming the best and brightest, they will assuredly continue to benefit the national economic landscape to improve the national interest.¹⁵⁶ Due to the inconsistent standards of administering the NIW, a parade of extraordinary and exceptional scientists will most likely take their innovative potential to other competing nations, taking technological and scientific developments with them.¹⁵⁷ By failing to consider how

148. *Highly Skilled Migrant Programme (HSMP) Points Calculator*, SKILLCLEAR, <http://www.skillclear.co.uk/hsmp-highly-skilled-migrant-programme-points-calculator.asp> [https://perma.cc/44CB-BT2U].

149. *Id.*

150. Press Release, Dep’t for Bus., Energy & Indus. Strategy, Innovate U.K., and The Rt Hon Jo Johnson MP, *£100 million Rutherford Fund to attract best researchers to the U.K.*, (Jul. 4, 2017), <https://www.gov.uk/government/news/100-million-rutherford-fund-to-attract-best-researchers-to-the-uk> [https://perma.cc/37Z9-7QAF].

151. *Id.*

152. *Id.*

153. CIC News, *Immigration Gives Competitive Advantage to Canada*, CANADA EDUC. CONSULTANTS (Nov. 8, 2018), <http://www.canadaeducationconsultants.com/immigration-gives-competitive-advantage-to-canada/> [https://perma.cc/SG4U-GB44].

154. *Id.*

155. Redden, *supra* note 144.

156. Orrenius, *supra* note 119.

157. Cerna, *supra* note 145.

immigrants have shaped the innovation-rich economy, the U.S. will miss out on opportunities to improve the economy.¹⁵⁸

IV. SUGGESTED METHODS TO REFORM THE NIW CLASSIFICATION

A. *The NIW is a shared interest within a divided government.*

In today's political climate, American immigration policy has become a *Kulturkampf* of competing ideologies.¹⁵⁹ Immigration policy has preoccupied the American political climate with politicians sensationalizing immigration policy and stonewalling policy negotiations, as experienced in the 35-day government shutdown in January and February of 2019. This unproductive case of negotiation stonewalling further polarized the immigration debate.¹⁶⁰ Likewise, "immigration is not a monolithic issue," with many pieces to the immigration policy puzzle.¹⁶¹ Congress has the potential to find common ground and work toward a pragmatic solution by breaking down immigration policy into its many parts for purposes of policy negotiations.¹⁶² Thus, in preventing further animosity in the immigration law debate, policymakers could first change the conversation on where the Venn diagram intersects and the parties agree, specifically on the NIW classification, before moving on the outward bounds of the Venn diagram and discussing more divisive topics.

If one were to create a Venn diagram to analyze the different policy perspectives on immigration law, it would be clear that Democrats and Republicans prioritize immigration policy reform differently, encircling hot button issues on both sides.¹⁶³ However, both parties' goals overlap

158. See Griswold, *supra* note 2, at 11 (discussing that "immigrants are more innovative than natives.").

159. See Charles R. Venator Santiago, *Countering Kulturkampf Politics Through Critique and Justice Pedagogy*, 50 VILL. L. REV. 749, 750 (2005) (discussing the German term *Kulturkampf* or "cultural wars" through the U.S. legal and political realm and discussing how such "cultural war" approach to policy undermine social, political, and cultural progress in law.).

160. Derek Thompson, *How Immigration Became So Controversial*, ATLANTIC (Feb. 2, 2018), <https://www.theatlantic.com/politics/archive/2018/02/why-immigration-divides/552125/> [<https://perma.cc/3EHX-LKR6>].

161. *Id.*

162. *Id.*

163. See Robert Reeves & Jeremiah Johnson, *REPUBLICAN VS. DEMOCRAT – Platforms On Immigration*, REEVES IMMIGR. L. GROUP, <https://www.reeves.com/immigration-news/republican-vs-democrat-platforms-on-immigration/> [<https://perma.cc/GE3C-MFC3>] (analyzing that conservative or Republican groups want to focus more on national security aspects of immigration reform with a lot of references to terrorism, drug cartels, and other criminal actors, and strict enforcement of the laws; while liberal or Democrat groups call for providing a path for undocumented immigrants to become U.S. citizens, increasing family and employment-based visas).

on support for a greater use of the NIW classification.¹⁶⁴ This analysis is useful under principles of negotiation theory which state that in solving challenging problems, it helps to look at where parties agree first.¹⁶⁵ In this case, there is bipartisan support for a greater use and clearer standard for the NIW classification. Negotiation theory teaches that “behind opposed positions lie shared and compatible interests.”¹⁶⁶ Both parties have a shared and compatible interest in using employment-based immigration law as a tool to grow the economy and welcome highly skilled immigrants to excel in a competitive global market.¹⁶⁷ Despite these differences, Democrats and Republicans have agreed on immigration reform to put the NIW to greater use. Thus, Congress should take a piecemeal approach to resolving the contentious immigration law debate by starting first with where the parties agree, and one point of agreement is on making greater use of the NIW classification.

Congress should focus first on employment-based visa programs, while examining border security and other contentious areas later. In amending IMMACT 90, Congress should consider the employment-based visa amendments in the Immigration in the National Interest Act of 1995 and 2017.¹⁶⁸ Recommendations from Representative Smith of Texas include: first, increase employment-based visas by 50%; and second, restructure employment-based visas as a merit-based points-based system;¹⁶⁹ the third proposal is to create categories of highly skilled immigrants as outstanding professors and researchers and multinational executives and managers to be relieved of the “time consuming labor certificate process;” and fourth, to restore “a national interest waiver of

164. See Jeh Charles Johnson, *supra* note 10 (discussing views on democrats supporting the NIW classification); see also Immigration in the National Interest Act of 2017, H.R. 3775, 115th Cong. (2017) (discussing views on republicans supporting the NIW classification and how it was sponsored by Rep. Lamar Smith of Texas, with one policy proposal to make greater use of the NIW standard).

165. John Graham, *Finding Common Ground: Negotiating and Resolving Conflicts (Part I)*, JOHN GRAHAM: LIFE ON THE EDGE, <https://www.johngraham.org/coach/17-finding-common-ground-negotiating-and-resolving-conflicts-part-i>. [<https://perma.cc/7H29-X5F8>] (John Graham was a former Foreign Service Officer and former policy adviser for Congressman John Glenn. Graham advises that in finding common ground parties look for “shareable ground whose boundaries are marked by a range of actions that all can live with.” Government officials often negotiate over policies and funding and looking for common ground is one strategy to end a stalled negotiation process).

166. ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 44–45 (Bruce Patton, ed., 3d ed. 2011).

167. Orrenius, *supra* note 119.

168. Immigration in the National Interest Act of 1995, H.R. 1915, 104th Cong. (1995); Immigration in the National Interest Act of 2017, H.R. 3775, 115th Cong. (2017).

169. 104 CONG. REC. H2378 (1996), <https://www.congress.gov/crec/1996/03/19/CREC-1996-03-19-pt1-PgH2378-5.pdf> [<https://perma.cc/TTJ4-FXJN>] (comments of Rep. Lamar Smith).

labor certification requirements and delineated specific criteria for its exercise.”¹⁷⁰

The first and third recommendations of increasing employment-based visas will restore America’s place in the world for innovation and research.¹⁷¹ The second and fourth recommendations are arguably more controversial. The merit-based points system may create a disproportionate and unbalanced work-force with the highly skilled and lower skilled employment or older workers less represented.¹⁷² For instance, the merit-based points system has the potential to impair the benefit of immigration employment visas because they address niches within the labor force on both ends of the skills spectrum with highly qualified (PhD) and lower-skilled positions (high-school graduates) at both ends of the spectrum.¹⁷³

The fourth suggestion to delineate specific criteria of the NIW classification calls for Congress to create a statutory scheme to create a more uniform approach to identify the evolving national interest. Congress has created national research institutes and centers to serve as a useful resources in defining the national interest. To standardize the NIW administration process, applicants should use a current DOL tool known as competency clusters, which are divided into three categories: knowledge, skills, and abilities (KSA).¹⁷⁴ Applying the KSA format will create a more user-friendly approach for petitioners and help adjudicators decide cases on the merits with all of the relevant information included under the three sections.

B. The NIW should be administered more efficiently.

Currently, NIW standards are unclear with guidelines on what adjudicators are looking for remaining unpublished and mysterious. In 2014, in a memorandum issued to USCIS, the Department of Homeland Security (DHS) Secretary Johnson directed USCIS to put the NIW to

170. *Id.*

171. See AUGUSTINE, *supra* note 1, at 18.

172. Priscilla Alvarez, *Is a ‘Merit-Based’ Immigration System a Good Idea?*, ATLANTIC (Mar. 11, 2017), <https://www.theatlantic.com/politics/archive/2017/03/trump-cotton-perdue-merit-based-immigration-system/518985/> [<https://perma.cc/Y84T-PBXE>].

173. See The Rt. Hon. Jo Johnson MP, *supra* note 150.

174. See *What Are KSAs?*, U.S. DEP’T OF VETERANS AFF., <https://www.va.gov/JOBS/hiring/apply/ksa.asp> [<https://perma.cc/KY2M-PDQ6>] (explaining how the competency clusters of Knowledge, Skills, and Abilities (KSA), is a useful tool to analyze job seekers); see also *The Importance of KSA’s (Knowledge, Skills and Abilities) in the Federal Application Process*, CTR. FOR DISEASE CONTROL (2018), <https://www.cdc.gov/hrmo/ksahowto.htm> [<https://perma.cc/JNY2-VFLJ>].

greater use as a strategy to promote research and development to improve the U.S. economy overall, recognizing that the NIW is an underused and misunderstood classification.¹⁷⁵ In 2016, the NIW issued a training manual entitled, “National Interest Waiver Adjudication Guidance,” which set forth the standards to use the *Dhanasar* ruling in adjudicating the NIW.¹⁷⁶ The USCIS did not publish this manual.¹⁷⁷

Critics may argue in favor of applying the general rule of the labor certificate process with no NIW exception. Some petitioners view the NIW as preferable because of the confusing and time-consuming labor certificate process¹⁷⁸ causing some petitioners to apply as a strategy to avoid the lengthy labor certificate process¹⁷⁹ and to prevent a potential labor certificate wait time from two to four years and thus further backlogging NIW petitions.¹⁸⁰ It would be more efficient for both the labor-certificate and the NIW process to improve the administrative customer service of USCIS by reducing the labor certificate processing time through rectifying backlog issues of the labor certification program.¹⁸¹ This would require a program evaluation investment.

The USCIS should re-implement policies that allow feedback by providing a Request for Evidence (RFE) and Notice of Intent to Deny (NOID) before a denial to communicate what the adjudicator believes is missing in the application.¹⁸² This will help make the highly subjective process more trustworthy. This system would be an evaluative process to assess one’s abilities regarding whether their proposed endeavors benefit the national interest. The USCIS should solve staffing and resourcing issues to adjudicate applicants in a timely manner. Another suggestion is

175. Jeh Charles Johnson, *supra* note 10.

176. U.S. Citizenship and Immigration Services, *supra* note 52, at 1, 12.

177. *Id.* (evaluating factors in deciding whether the alien is well-positioned to advance the endeavor).

178. See Kyle Knapp, *The Green Card Backlog—Take a Number and Wait . . . A Long Time*, 16 No. 11 OHIO EMP. L. LETTER 4, at 1 (2015) (evaluating the backlog issue of EB-2 visas and within the labor certificate process); see also Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System, 69 Fed. Reg. 247, 77326 (Dec. 27, 2004) (to be codified at 20 C.F.R. pt. 655–6); see also *Liberty Fund, Inc. v. Chao*, 394 F. Supp. 2d 105, 111 (D.D.C. 2005) (analyzing problems with the labor certificate process).

179. See generally *Liberty Fund, Inc. v. Chao*, 394 F. Supp. 2d 105 (D.D.C. 2005) (evaluating problems in the labor certificate process).

180. *Id.*

181. *Id.*

182. Policy Memorandum from the U.S. Citizenship and Immigration Services on the Issuance of Certain RFEs and NOIDs; Revisions to Adjudicator’s Field Manual (AFM) Chapter 10.5(a), Chapter 10.5(b) (Jul. 13, 2018), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/AFM_10_Standards_for_RFEs_and_NOIDs_FINAL2.pdf [http://perma.cc/6WTB-KGTR].

to work with professionals to redesign the process of adjudicating petitions, while maintaining RFE and NOID safeguards for applicants to supply the adjudicators with documents needed to decide the merits of the case.

If the public cannot trust agencies such as the USCIS to determine which immigrant applicants fall within the national interest, the nation suffers economically and culturally. The best and brightest may struggle through the confusing and time-consuming process and may take their ambitions and skills to another country competing directly with the U.S.¹⁸³ The court in *Davis* ruled that “Congress alone has the constitutional authority to prescribe rules for naturalization. Therefore, the courts’ task is to ensure ‘strict compliance with the statutory conditions precedent to naturalization.’”¹⁸⁴ Under this ruling the administrative agency is relying on unclear standards for NIW petitions. To change the law, USCIS should consult Congress and not write policies and call them laws.¹⁸⁵ The USCIS has hijacked the process by tightly controlling and circumventing the role of Congress and the public who elected their Congressional representatives by defining what the national interest is and by making it more difficult to attain the NIW benefit. Overall, the new NIW standards make the process much harder and less transparent, creating a strong argument in favor of Congressional action.

The USCIS should apply a more customer friendly approach for NIW applicants, with more effective communication and transparency on what USCIS is looking for in applications and how it will weigh different factors. The USCIS applies a user-friendly process with its I-130, petition for alien relatives¹⁸⁶, and I-918, petition for U nonimmigrant status.¹⁸⁷ These websites offer petitioners information and provide charts and questions with answers to help petitioners have a grounded idea on the application process. This makes the process more trustworthy. The USCIS should consult with professionals to invest in renovating their website to improve the ease of use, organizational structure, exchange feedback features, and transparency to make for a more customer-friendly experience.¹⁸⁸ These changes will help attract the best and brightest and

183. 104 CONG. REC. H2378, *supra* note 169.

184. *Davis v. Sessions*, 293 F. Supp. 3d 678, 683 (S.D. Tex. 2018).

185. See U.S. Citizenship and Immigration Services, *supra* note 52, at 1, 12 (Dictating a framework and a field manual for USCIS professionals to use in their evaluations).

186. *I-130 Petition for Alien Relative*, U.S. CITIZENSHIP AND IMMIGR. SERV., <https://www.uscis.gov/i-130> [<https://perma.cc/BA95-Z5FP>].

187. *I-918 Petition for U Nonimmigrant Status*, U.S. CITIZENSHIP AND IMMIGR. SERV., <https://www.uscis.gov/i-918> [<https://perma.cc/34QN-YUBZ>].

188. Andrew K. Schnackenberg & Edward C. Tomlinson, *Organizational Transparency: A New*

not push potential petitioners away to competing nations that attract the best and brightest by using an effective website and even social media platforms with useful features to share information about the NIW process.¹⁸⁹ These changes will help demystify the process and make the adjudication process a more workable approach to applying for the NIW benefit by preventing good applicants from being denied for bad reasons.

*C. The NIW petitions should follow a two-step administrative process.*¹⁹⁰

Step one should be creating a flexible standard to identify the national interest that the petitioner claims they are well-positioned to advance. Delineating the national interest will work more efficiently by using respected organizations to apply their specialized findings that identify goals that are within the national interest. For instance, the federal government has created organizations such as the National Science Foundation (NSF) and the National Institutes of Health (NIH) to promote the progress of science in the United States that serves the national interest in federal funding for scientific research. These organizations have “played an integral role in funding breakthrough discoveries” in diverse fields.¹⁹¹ The NSF further branches out to seven research areas, including subjects on geoscience and engineering, that further identify what research skills are currently needed within specific fields.¹⁹²

For petitioners within the health sciences, an immigration petitioner could find authority within the NIH. The NIH is the nation’s medical research agency comprised of 27 different research institutes and centers that strategically identify what health issues are within the national health interest, and where to invest to reach these goals.¹⁹³ Illustrative of using nationally recognized research institutes and centers as a reference point

Perspective on Managing Trust in Organization-Stakeholder Relationships, 42 J. OF MGMT. 1784–89 (2016) (discussing the trust aspect of the relationship between an organization and a stakeholder when seeking information on their webpage and the importance of using features that promote transparency and ease of accessing information).

189. See *Explore NZ Visa Options*, MINISTRY OF BUS., INNOVATION & EMP., <https://www.immigration.govt.nz/new-zealand-visas> [<https://perma.cc/3JF7-REBR>] (demonstrating how the immigration services website in New Zealand offers a website with features that help the potential visa applicant to navigate the website easily with more transparency features).

190. See *infra* Appendix A & B (Proposed Two-Step Process for Delineating the NIW).

191. H.R. REP. NO. 114-412, at 1 (2015).

192. *Research Areas*, NAT’L SCI. FOUND., https://www.nsf.gov/about/research_areas.jsp [<https://perma.cc/CT7L-ET3N>].

193. *Who We Are*, NAT’L INST’S OF HEALTH, <https://www.nih.gov/about-nih/who-we-are> [<https://perma.cc/YA6Q-UAVD>].

to identify what is within the national interest the National Eye Institute (NEI) is an agency within the NIH. Under the NEI objectives, a biochemist whose qualifications and work endeavors uniquely address meeting the objectives of the NEI of reducing retinal disease and blindness, meets the national interest.¹⁹⁴ The NEI plays a vital role in advancing biomedical research and is a trusted authority for what fits within the national interest in the specialty of eye health.¹⁹⁵ A person claiming that their endeavors are within the national interest could reference the NEI's objectives in their petition as authority for their claim.

Specific governmental agencies could work with the USCIS to define the national interest for effective administration of the NIW petitions. Educational professionals could reference the Department of Education and specifically reference if their area of teaching and research falls within the Nationwide Teaching Shortage Areas Listing to demonstrate the national interest in their area of education.¹⁹⁶ Entrepreneurs could seek out authority from the Small Business Administration, an agency of the U.S. Government that identifies business plans that meet geographic economic needs.¹⁹⁷ Petitioners in the arts could look to the Smithsonian Institute, a government funded organization that supports research centers in science, the arts, and the humanities.¹⁹⁸ Other reputable authorities for petitioners in the arts to reference could be the American Academy of Arts and Sciences, the oldest learned society in the U.S. that is focused on the advancement and study of key and current societal, scientific, and intellectual issues. The American Academy of Arts and Sciences provides several research fellowship programs, awards, and projects.¹⁹⁹ State agencies are also a strong resource in defining the national interest. For instance, Congress created a specialized program for

194. Basu, 11 I. & N. Dec. 777 (B.I.A. 1966) (stating that, "a biochemist is a member of the professional occupations in biological sciences and such professional occupations are within the meaning of sections 101(a)(32) and 203(a)(3) of the Immigration and Nationality Act.").

195. See National Institutes of Health Reform Act of 2006, H.R. 6164, 109th Cong. (2006) (reaffirming the importance of NIH and its vital role in advancing biomedical research to improve the health of the Nation. A national goal is to improve the visual health of the Nation through prevention, early detection, timely treatment, and rehabilitation.); see also Vision, HEALTHY PEOPLE, <https://www.healthypeople.gov/2020/topics-objectives/topic/vision> [<https://perma.cc/JKP8-XVKD>] (reporting that a national goal under this national research center is to improve the visual health of the Nation through prevention, early detection, timely treatment, and rehabilitation. Specifically see objective V-5.5, stating an objective is to reduce age-related macular degeneration (AMD) by 14%).

196. *Teacher Shortage Areas*, U.S. DEP'T OF EDU., <https://www2.ed.gov/about/offices/list/ope/pol/tsa.html> [<https://perma.cc/KMF2-6EJV>].

197. SMALL BUS. ADMIN., <https://www.sba.gov/> [<https://perma.cc/W8UZ-CS78>].

198. *Research Centers*, SMITHSONIAN INST., <https://www.si.edu/ResearchCenters> [<https://perma.cc/5BVP-NEUB>].

199. AM. ACAD. OF ARTS & SCI., <https://www.amacad.org/> [<https://perma.cc/NGR2-VQ7T>].

physicians working within the national interest for “[p]hysicians working in shortage areas or veterans’ facilities.”²⁰⁰ Under this Physician NIW program, specialized state agencies such as the State’s Department of Health or Public Health agency help define what fits within the public interest for physicians.²⁰¹

Step-two: analyzing a petitioner’s competency under the KSA approach will standardize the process and make it clearer for petitioners on what to include in their application. The current application process fails to instruct applicants on how to write a petition that expresses how their endeavors fit within the national interest under the Act, how they are well-positioned to carry out those goals, and why they deserve a job-offer waiver.²⁰² After explicitly classifying what area of national interest the petitioner’s work endeavors fit into, the next proposed step is to prove that the endeavor will benefit prospectively the national economy, cultural or educational interests, or the welfare of the United States. To prove that the petitioner can add to this area within the exceptional ability standard set by Congress would be more efficient if the process were standardized through current DOL standards. The USCIS should change standards outlined in the training manual entitled the “National Interest Waiver Adjudication Guidance,” which is a resource for adjudicators to evaluate petitioners.²⁰³ This resource could be applied to fit within the competency scheme known as KSA, while publishing and explaining the new system. This will help frame the NIW petitions in an organized and efficient manner.

After an applicant determines if their proposed endeavor falls within the national interest, the applicant then conveys that they are competent to advance the proposed endeavor by providing comprehensive statements with evidence supporting their KSA’s. Because this is the standard when applying for jobs with the U.S. federal government, this will be a smooth transition²⁰⁴ as the U.S. Office of Personnel Management states on its webpage: “A competency is a measurable pattern of knowledge, skills,

200. 8 U.S.C. § 1153(b)(2)(B)(ii) (2011).

201. 8 U.S.C. § 1153(b)(2)(B)(ii)(I)(aa)–(bb) (2018).

202. See *Employment-Based Immigration: Second Preference EB-2*, U.S. CITIZENSHIP AND IMMIGR. SERV., <https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-second-preference-eb-2> [<https://perma.cc/2XK9-U68U>] (educating applicants to file an I-140 petition with an NIW self-petition filings); see also *I-140 Immigrant Petition for Alien Workers*, U.S. CITIZENSHIP AND IMMIGR. SERV., <https://www.uscis.gov/i-140> [<https://perma.cc/6M42-6RF4>] (examining the I-140 and NIW filing process).

203. U.S. Citizenship and Immigration Services, *supra* note 52, at 1, 12.

204. See U.S. Dep’t of Veterans Affairs, *supra* note 174; see also U.S. Dep’t of Health and Human Services, *supra* note 174.

abilities, behaviors, and other characteristics that an individual needs to perform work roles or occupational functions successfully.”²⁰⁵ These “competency clusters” specify the “how” of performing job tasks, or “what the person needs to do the job successfully.”²⁰⁶ The KSA approach employs tools that the DOL uses to analyze jobs and workforce trends.²⁰⁷ The DOL also uses tools to help analyze and define job offers and job titles for purposes of issuing labor certificates and these tools such as the KSA’s could help applicants to structure their petition.²⁰⁸ These changes may take time to implement, but they also will prove to be cost effective in the long-term by helping the U.S. retain the best and brightest.

V. CONCLUSION

In closing, putting the NIW to greater use will help solve national interest goals of improving technological innovations and increasing America’s economic competitive advantage. The NIW remains an underutilized tool that Congress designed to provide an exception to the cumbersome job offer requirement by employment-based visas available for those unique petitioners whose work of endeavors are within the national interest. The NIW could be an effective tool to improve the economy; putting the NIW to greater use is a shared and compatible interest among Democrats and Republicans.

Policymakers who want the NIW to be put to greater use can anchor their arguments on how immigrants benefit the economy by adding to the innovation-rich economy and research and development. Despite the political support, the NIW remains an underutilized tool. It is important to reform the NIW adjudication process to make the system more attractive and to retain the best and brightest. In contrast, views that seek to limit the NIW benefit favor a more conservative immigration policy. These views want to shift the debate from the focus of delineating the kinds of immigrants that we should seek and getting them to enter the U.S. toward border security and limiting risk by issuing significantly fewer immigrant visas. However, these views are not well supported in the research and often contain cherry-pick data to minimize a complex issue.

The current process of deferring the national interest standard to the

205. U.S. OFF. OF PERS. MGMT., ASSESSMENT & SELECTION COMPETENCIES, <https://www.opm.gov/policy-data-oversight/assessment-and-selection/competencies> [https://perma.cc/F766-8NKW].

206. *Id.*

207. U.S. DEP’T OF LABOR, EMP’T & TRAINING ADMIN., O*NET ONLINE, <https://www.onetonline.org/> [https://perma.cc/MRQ7-T5HP].

208. Hermann, *supra* note 24.

USCIS conflicts with the dynamic and evolving needs of what work is within the national interest. In resolving this conflict, NIW adjudicators should take advantage of the wealth of resources available in defining what work is within the national interest with nationally supported research institutes and centers. The NIW adjudicators could then apply DOL standards to analyze an applicant's competency and frame one's petition in a standardize and efficient manner. The changes proposed will benefit the public by ensuring that Congress' intent is well served in adding to the economic structure of the U.S. while making immigration reform a key to our international economic and competitive advantage. The proposed changes will improve the adjudication process by creating a more uniform and user-friendly approach, providing for clearer party expectations, and reaching better results. In essence, lawmakers should cultivate and reinvent the NIW classification.

PROPOSED TWO-STEP PROCESS FOR DELINEATING THE NIW²⁰⁹
APPENDIX A: STEP ONE: DELINEATING THE NATIONAL INTEREST

Field of endeavor	Examples of authorities to reference ²¹⁰
SCIENCE	National Institutes of Health ²¹¹ National Cancer Institute National Institute of Allergy & Infectious Diseases National Institute of Diabetes and Digestive and Kidney Diseases National Health, Lung, and Blood Institute National Institute of Mental Health National Institute of Neurological Disorders and Stroke National Eye Institute National Science Foundation Brookhaven National Laboratory (BNL) International Arctic Research Center
ARTS	Smithsonian Institute, Research Centers Museum Conservation Institute Smithsonian Astrophysical Observatory Smithsonian Conservation Biology Institute John F. Kennedy Center for the Performing Arts The American Academy of Arts and Sciences National Academy of Design
OTHER PROFESSIONALS	Teachers: Dep't of Education, Nationwide Teacher Shortage Areas Listing
ENTREPRENEURS	Small Business Association and local business development centers ²¹²

209. This chart reviews the proposed two-steps in delineating the NIW for purposes of administering the EB-2 NIW classification with examples of authorities to consider when identifying the national interest field of endeavor and for how applicants would communicate that they are competent to advance the field of endeavor referenced.

210. This is not an exhaustive list, just an example the respected resources at hand that work to delineate what areas of work are within the national interest.

211. The National Institutes of Health (NIH) is comprised of 27 national research institutes and centers, which identifies what areas of research are needed and helpfully delineate objectives and standards.

212. Small Business Association is an agency of the U.S. Government that provides support to entrepreneurs and small businesses.

APPENDIX B: NARRATING ONES COMPETENCY UNDER THE NIW²¹³

Competency Cluster	Factors to consider for the NIW petition under a KSA framework
KNOWLEDGE	Degree, licenses or certifications in the field, any intellectual property owned by petitioner, published articles in professional journals or media reports about the petitioner's achievements. ²¹⁴ Citation history; awards, or grants ²¹⁵
SKILLS	Letters from experts in the field with knowledge from petitioner's past achievements and proving of how the petitioner is well-positioned to advance the endeavor ²¹⁶ evidence that demonstrates their ability to advance goals of manufacturing processes, medical advances, job growth in economically depressed areas. Considering reports from government agencies, industry groups of NGOs describing the field of endeavor; articles in professional or scientific journals, or media; and evidence of skills and proof of support, and commitment. ²¹⁷
ABILITIES	Plans to carry out the endeavor, evidence of financial support to carry out the endeavor, progress toward achieving the achieved endeavor, interest from investors, users, customers etc., ²¹⁸ A detailed business plan financial plan. ²¹⁹ Interests from their stakeholders. ²²⁰ any contracts with companies. ²²¹
OTHER FACTORS	if there is a sense of sufficient urgency underlining the petitioner's national interest within their contributions; and "whether the endeavor has the potential for job creation," and does not adversely affect U.S. workers." ²²²

213. This chart is not an exhaustive list, but rather an example of how USCIS could communicate to petitioners how to express their competencies using the KSA format by being transparent and offering a clear standardized process.

214. See U.S. Citizenship and Immigration Services, *supra* note 52, at 12 (evaluating factors in deciding whether the alien is well-positioned to advance the endeavor).

215. *Id.* at 26.

216. *Id.*

217. *Id.* at 20–21.

218. *Id.* at 11.

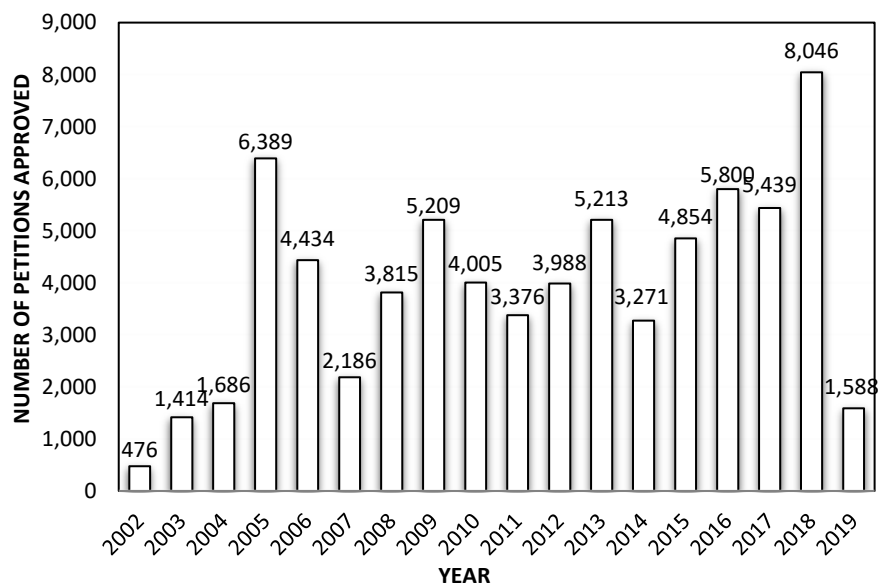
219. *Id.* at 25.

220. *Id.* at 22.

221. *Id.* at 27.

222. *Id.* at 30.

FIGURE 1: THIS REPORT INDICATES THE **TOTAL NUMBER OF I-140 PETITIONS APPROVED** FOR NATIONAL INTEREST WAIVER BETWEEN FISCAL YEARS 2002 UP TO FEBRUARY 04, 2019.²²³



223. Letter from Jill A. Eggleston, Director, FOIA Operations, United States Citizenship & Immigration Services, Form I-140, Immigration Petition for Alien Workers Approvals for National Interest Waiver from 2000 to February 04, 2019 (unpublished database, received through Freedom of Information Act Request) (on file with author).